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7                   BEFORE THE STATE OF WASHINGTON  
8                   ENERGY FACILITY SITE EVALUATION COUNCIL

9           In the matter of:

NO. 99-01

10          APPLICATION NO. 99-1

COUNSEL FOR THE  
ENVIRONMENT'S RESPONSE TO  
PETITION FOR RECONSIDERATION

11          SUMAS ENERGY 2 GENERATION  
FACILITY

12                   **I.       PROCEDURAL BACKGROUND**

13               The EFSEC announced its recommendation to deny application 99-01 on February 16,  
14               2001, by Order 754. In so doing, the EFSEC laid out the plethora of environmental impacts  
15               which could not be adequately mitigated by the application as proposed and the dilemma the  
16               EFSEC faced in light of the applicant's insistence at the hearing for the configuration as set  
17               forth in the January 2000 amended application.

18               The EFSEC granted the applicant's request to delay transmittal of the recommendation  
19               to the Governor until after the EFSEC ruled on the applicant's Petition for Reconsideration.  
20               Applicant filed a petition, proposed supplemental evidence, an amended draft site certification  
21               agreement, and Attachment 6 on March 5, 2001. Interested parties were allowed until  
22               March 30, 2001, to respond. Parties were also asked pursuant to Order 756 to address whether  
23               the applicants proposed changes would address their concerns; what new evidence, if any, is  
24               necessary as a result of the petition for reconsideration AND whether new public hearings are  
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1 necessary on air and wetlands issues in order to comply with applicable Clean Air and Water  
2 ACT requirements. The Counsel for the Environment's response follows.

## 3 II. ARGUMENT

4 There is an adage, when the law is not on your side, argue the facts and visa versa.  
5 Here, the applicant fails to site legal authority for its assertion that it is either entitled to  
6 reconsideration or the introduction of new evidence. Instead, the petitioner merely rehashes  
7 the evidence presented at the hearing and cries "energy crisis"! Whether there is a crisis or not,  
8 is academic, because the role of EFSEC is to strike a balance between the needs of the  
9 environment and the need for energy. The needs and balances were fully debated during the  
10 hearings. Continued harping on the issue of the "crisis" serves to inflame but not inform this  
11 process. Reconsideration is an opportunity to correct any obvious mistakes in the order based  
12 on the record and is not to be based on evidence that could have been supplied earlier nor new  
13 evidence that is not substantial.

14 As Counsel for the Environment, I have attempted to separate the hyperbole from the  
15 facts and where warranted, "dumbed" the technical down to a level for lay comprehension.  
16 Here I feel no such compunction. The petitioner offers nothing sophisticated, and aside from  
17 the requested new evidence, nothing new other than an effort to acquiesce to conditions which  
18 the applicant steadfastly refused to consider during a time when a record on the manifestations  
19 of these changes could have been adjudicated. Instead, the applicant has chosen a tactic of  
20 waiting to see how the wind would blow and make concessions<sup>1</sup> unilaterally without the

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21 <sup>1</sup> Concessions may not be the proper term for the current effort exercise by the applicant. For example,  
22 the motion at 8 suggests the applicant "is prepared to accept" the need and consistency language which was used  
23 in earlier site certifications. The applicant "accepts " while suggesting that the EFSEC's actions are inconsistent  
24 with its statute and prior decisions and not supported by the record. Thus, the concession is that EFSEC has the  
25 authority to impose conditions generally but not the conditions it is willing to "accept" in this case. Presumably,  
this distinction leaves open the argument on appeal. Similarly, the applicant "is willing to accept" certification of  
the project on condition of elimination of the back-up fuel option. Are these stipulations or are they maneuvers  
for the next phase?

1 benefit of careful deliberation. For example, the applicant in its closing brief offered to  
2 decrease the size of the diesel tank but provided no one with an opportunity to determine what  
3 effect this material change would have on relevant issues. The impact on the traffic pattern, air  
4 conditions due to transport and the effect on the price or availability of diesel as a result of the  
5 plant potentially seeking fuel at the same time the community might be seeking it for its use  
6 could not be analyzed. Similarly, the offer to abandon the diesel back up once the record closed  
7 eliminates the possibility of a party raising in its own petition for reconsideration the EFSEC's  
8 failure to address the issue of access and price of natural gas on the local community. The  
9 recommendation to deny made the natural gas argument unnecessary. The unilateral effort to  
10 reconfigure the structure of the operation to eliminate diesel renews this issue but provides no  
11 meaningful forum for reconsideration other than this effort to point out the prejudice this action  
12 enables.

13 While applicant labels this motion "reconsideration," in reality it is a petition to amend  
14 its application after fact-finding while suggesting that there is no need to reopen the record  
15 because new evidence is not necessary<sup>2</sup> (Motion at 30).

16 **A. Petitioner Is Seeking An Amendment Of Its Application In An Untimely Manner**

17 WAC 463.42.690(2) authorizes amendment of the application at least 30 days prior to  
18 the commencement of the adjudicative hearing. Amendments thereafter are only allowed  
19 within 30 days of the hearing WAC 463.43.090(3) & (4). The applicant has already sought  
20 and obtained this relief. The original application was filed in January 1999. At that time, the  
21 applicant also sought expedited review pursuant to RCW 80.50.075 suggesting a full review  
22 was not necessary. This request was subsequently withdrawn. In January 2000 the applicant  
23 filed a dramatically amended application. These changes were a result of the review by the  
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25 <sup>2</sup> Why the applicant then offers 3 documents is not explained.

1 EFSEC consultant and the public comment. During the pre-hearing phase of these  
2 proceedings, the parties worked diligently to frame the issues that were in dispute. The result  
3 was full knowledge by all parties and the EFSEC regarding the scope of the issues in dispute as  
4 required by WAC 463.30.270. Never during these proceedings was there a suggestion by the  
5 applicant that its position would change. Never, was there an attempt by the applicant to put  
6 the parties or the EFSEC on notice that it was going to shift gears and offer another series of  
7 options. As a result, the focus of attention was on the application as amended in the January  
8 2000 filing. The adjudication focused on the issues as they were known at the time. The  
9 evidence was geared towards the application as amended.

10 Now the applicant is asking that the evidence developed by the parties to address the  
11 concerns for a plant with a known configuration be reconsidered for another with scant  
12 attention to the reality of how dramatic a change the new configuration might be. At this  
13 juncture, Counsel for the Environment can only speculate on whether the changes proposed  
14 would address all her concerns because as Counsel for the Environment's proposed but not  
15 admitted findings assert, there is a dramatic need for further study of the known features. This  
16 begs the question of what would need to be studied of the unknowns.

17 The applicant offers no basis for why it should not be held to the requirements of  
18 WAC 463.42.690. This rule exists so that all parties have an opportunity to adequately  
19 prepare. It is ludicrous to suggest that the time for reconfiguring the proposal can be long past  
20 the 30-day limit as set forth in the WAC. There is no provision for amendment of an  
21 application post deliberation and a motion for reconsideration should not be used to attempt to  
22 circumvent the reasonable limits imposed by the procedural rules.

1 **B. A New Application Is The Proper Process**

2 The proper process to be used for an inadequate, incomplete or dramatically amended  
3 application post hearing is the process set out in RCW 80.50.100(3)—to wit, a new application  
4 based on changed conditions or new information. Absent this procedural protection the  
5 EFSEC is encouraging this applicant and future applicants to see what they can get away with  
6 then come back and piecemeal a project together. The burden is on the applicant to submit a  
7 complete and adequate application. WAC 463.42.690(1).

8 If via a petition for reconsideration, the record is allowed to be re-opened to allow  
9 argument about a redesign of the project, it renders the statutory process superfluous.

10 (3) The rejection of an application for certification by the governor shall be final  
11 as to that application but shall not preclude submission of a subsequent  
12 application for the same site on the basis of changed conditions or new  
information.

13 RCW 80.50.100(3).

14 The process for a new application exists to address the reality of how fundamental  
15 changes in design cannot be evaluated in isolation. It is necessary to reevaluate the entire  
16 project in light of the amended design. This requires a new and complete application so the  
17 parties are not continuously attempting to evaluate a moving target. It is frustrating enough for  
18 the parties. As Counsel for the Environment, I am concerned about the citizens' ability to stay  
19 informed in a reasonable way. The process that protects these reasonable expectations is the  
20 new application process. The review by the EFSEC consultant, public hearings and the  
21 adjudicative phase meets these expectations.

22 In addition, changing the project at this late date severely prejudices the parties and the  
23 public. Advocates geared their resources towards addressing the concerns regarding a known  
24 project. This included prioritizing the use of limited resources. Had Counsel for the  
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1 Environment known the application would have “morphed” into one without back-up fuel for  
2 example, I may have reprioritized where I spent my time. As it was, analyzing the impact of  
3 the diesel fuel drove how I approached the issues of the fire risk, air, and water issues. Had  
4 this not been the configuration, I may well have spent more time on assessing the other fire  
5 hazards, impact on wetlands by other features of the plant and more attention to the impact on  
6 gas prices. A piecemeal approach as suggested by applicant robs me of the capacity to do this  
7 in a meaningful way and allows the applicant to reconfigure based on its loser arguments  
8 without having to reassess, reprioritize or re-analyze the impact on other features of the  
9 proposal.

10 **C. Grounds For Reconsideration**

11 **1. Reconsideration Is Discretionary And A Decision To Deny Reconsideration**  
12 **Is Not Reviewable**

13 EFSEC laws and regulations and the APA govern the course of these proceedings.  
14 RCW 80.50.040. Reconsideration is authorized pursuant to RCW 34.05.470 and WAC  
15 463.30.335. These provisions offer little guidance regarding the criteria to be used. What is  
16 clear however is that the decision is purely discretionary. RCW 34.05.470(5) provides; “The  
17 filing of a petition for reconsideration is not a prerequisite for seeking judicial review. An  
18 order denying reconsideration, or a notice provided for in subsection (3)(b) of this section is  
19 not subject to judicial review”.

20 RCW34.05.001 provides in relevant part “...The legislature also intends that the courts  
21 should interpret provisions of this chapter consistently with decisions of other courts  
22 interpreting similar provisions of other states, the federal government and model acts.  
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1 In Interstate Commerce Comm’n v. Bhd. of Locomotive Engineers, 482 U.S. 270, 107  
2 S. Ct. 2360, (1987) A party filed a petition for clarification of an ICC <sup>3</sup>order. The petition was  
3 denied, as was the motion for reconsideration of the same order. The Court noted “...where a  
4 party petitions an agency for reconsideration on the ground of “material error,” *i.e.*, on the  
5 same record that was before the agency when it rendered its original decision, “an order which  
6 merely denies rehearing of...[the prior] order is not itself reviewable.” Microwave  
7 Communications, Inc. v. FCC, 169 U.S. App. D.C. 154, 156 n. 7, 515 F.2d 385, 387, n. 7  
8 (1974). *See also* SEC v. Louisiana Public Service Comm’n, 353 U.S. 368, 371-372, 77 S. Ct.  
9 855, 857, 1 L. Ed. 2d 897 (1957); National Bank of Davis v. Office of Comptroller of  
10 Currency, 233 U.S. App.D.C. 284, 285, and n.3, 725 F.2d 1390, 1391, and n.3 (1984); 5 U.S.C.  
11 § 701(a)(2). This rule is familiar from other contexts. If a judicial panel or an en banc court  
12 denies rehearing, no one supposes that that denial, as opposed to the panel opinion, is an  
13 appealable action (though the filing of a timely rehearing petition, like the filing of a timely  
14 petition for agency reconsideration, extends the time for appealing from the original decision.  
15 Discussing the attributes of the Hobbs Act as it applies to ICC proceedings, the Court noted  
16 “While the Hobbs Act specifies the form of proceeding for judicial review of ICC orders, *See* 5  
17 U.S.C. § 703, it is the Administrative Procedure Act (APA) that codifies the nature and  
18 attributes of judicial review, including the traditional principle of its unavailability “to the  
19 extent that...agency action is committed to agency discretion by law 5 U.S.C. § 701 (a)(2)”  
20 Interstate Commerce Comm’n, 482 U.S. at 282. In its wisdom the Court coined a phrase that  
21 may serve us well here “...the agency’s refusal to go back over ploughed ground is not

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22 <sup>3</sup> The Commission’s authority to reopen and reconsider its prior actions stems from 49 U.S.C. §  
23 10327(g), which provides: “The Commission may, at any time on its own initiative because of material error, new  
24 evidence, or substantially changed circumstance—(A) reopen a proceeding; (B) grant rehearing, reargument, or  
25 reconsideration of an action of the Commission; and (C) change an action of the Commission. An interested party  
may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the  
Commission.” Interstate Commerce, 482 U.S. at 277-278.

1 reviewable” Interstate Commerce Comm’n, 482 U.S. at 284. The same wisdom which  
2 underlies the Federal APA underlies the Washington APA. The applicant is asking EFSEC to  
3 re-plough. This requested activity is not warranted.

4 EFSEC may also look to other state agencies that have developed criteria for  
5 reconsideration. The Department of Employment Security provides:

6 ... (2) No matter will be reconsidered by the commissioner unless it clearly  
7 appears from the face of the petition for reconsideration and the argument  
8 submitted in support thereof that (a) there is **obvious material, clerical error** in  
9 the decision or (b) the **petitioner, through no fault of his or her own, has been**  
10 **denied a reasonable opportunity to present argument** or respond to argument  
11 pursuant to WAC 192-04-170.

12 WAC 192-04-190(2) (emphasis added).

13 The Department of Health criteria reflects a similar theme:

14 ... (2) Grounds for reconsideration shall be limited to: (a) **Specific errors of fact**  
15 **or law**; or (b) Implementation of the final order would **require department**  
16 **activities inconsistent with current department practice**; or (c) Specific  
17 circumstances render the **person requesting reconsideration unable to comply**  
18 **with the terms of the order**.

19 ...  
20 (4) If reconsideration is requested based on an error of fact, the request for  
21 reconsideration shall contain specific reference to the record. If reconsideration is  
22 requested based on testimony of record, the request for reconsideration shall  
23 contain specific reference to the testimony. The presiding officer may require that  
24 the party requesting reconsideration submit a copy of the transcript of the  
25 adjudicative proceeding and provide specific reference to the transcript.

WAC 246-10-704(2) and (4) (emphasis added).

The Human Rights Commission criteria provides:

(1) Motion. Within ten days after being served with the final order of an  
administrative law judge, any party may serve and file a motion for  
reconsideration with the commission clerk. The motion shall identify the points  
that the party desires to have reconsidered and shall **fully state the reasons** for  
reconsideration. The motion shall in all other respects proceed as provided in  
RCW 34.05.470.

(3) Reconsideration not necessary for appeal. Motions for reconsideration should be made only when a **party feels that the administrative law judge has overlooked or misunderstood something**. It is not necessary to file a motion for reconsideration in order to appeal. RCW 34.05.470(5).

WAC 162-08-311 (1)&(3) (emphasis added)

## **2. Applicability of CR 59**

Other hearing tribunals have suggested that the criteria for reconsideration is akin to reconsideration pursuant to CR 59<sup>4</sup>. In Bhatia vs. Dep't of Ecology, SHB 95-34 (copy attached as App. A) the Shorelines Hearings Board denied reconsideration. It held that:

...“**Reconsideration** can be granted for “newly discovered evidence...which could not with reasonable diligence have [been] discovered and produced at the trial.” CR 59(4). A new hearing will not be granted on the ground of newly discovered evidence, unless the moving party demonstrates that the evidence (1) will probably change the result of the...[hearing]; (2) was discovered since the...[hearing]; (3) could not have been discovered before trial by the exercise of due diligence; (is material; and (5) is not merely cumulative or impeaching. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), cert. denied 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

In Bhatia, the petitioner sought admission of a geotechnical report filed with the motion for reconsideration. The board found the report to be hearsay and the real issue to be the admission of new expert testimony. The board found that the information was available with due diligence at the time of the hearing and therefore failed to meet the criteria of CR 59(4). Similarly the Pollution Control Board in Hazen vs. Dep't of Ecology, PCHB Nos. 93-33 & 93-34 (attached as App. B) found CR 59 criteria controlling. In both these cases, as here, the applicant is seeking to admit new evidence in the form of new documents and an amended

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<sup>4</sup> The appellate court has found that the Civil and Appellate Rules of Procedure are inapplicable to APA proceedings in two cases stemming from the Employment Security Department. In both cases the relevant issue was the timeliness of a review within the agency. The relevant regulations have changed since these cases were decided. See Scully v. Employment Security Dep't, 42 Wn. App. 596, 602 (1986) citing Rasmussen v. Employment Security Dep't, 30 Wn. App. 671, 674 (1980). Both the Pollution Control Board and the Shorelines Hearings Board have adopted the civil rules as guidance for their procedures when that rule is not in conflict with other board rules WAC 371-08-300 and WAC 461-08-300 respectively.

1 application and has failed to satisfy or even allege it has satisfied the criteria for admission of  
2 new evidence. CR 59(4) provides several grounds for reconsideration:

3 (a) Grounds for New Trial or Reconsideration. The verdict or other decision may  
4 be vacated and a new trial granted to all or any of the parties and on all or part of  
5 the issues when such issues are clearly and fairly separable and distinct, on the  
6 motion of the party aggrieved for any one of the following causes materially  
affecting the substantial rights of such parties:...(4) Newly discovered evidence,  
material for the party making the application, which he could not with reasonable  
diligence have discovered and produced at the trial...

7 The applicant has not indicated which grounds are relevant to this motion and invites  
8 with this lack of specificity, speculation on what the grounds might be. This burden is on the  
9 petitioner and not the EFSEC or other parties to figure out the basis for the motion. The motion  
10 should be denied on this basis alone.

11 Allowing the applicant to provide this basis for the first time in a response without an  
12 opportunity for the other parties to respond would be improper and highly prejudicial. In fact,  
13 the applicant suggests that there is no need to reopen the record. It suggests simply allowing  
14 the other parties to respond to its motion (Motion at 30). The premise of this argument seems  
15 to be that the record already contains all the information necessary to decide this matter, so just  
16 look at it again. This argument, however, fails to take into account the domino effect of each  
17 change and the need to evaluate its impact in light of all the other issues. Nor does it satisfy  
18 the criteria for reconsideration pursuant to CR 59.

19 Whether the EFSEC in its discretion analogizes to another hearing tribunal's criteria or  
20 creates its own, the decision to reconsider rests solely within EFSEC discretion. Let us not re-  
21 plough this ground.

#### 22 **D. Judicial Review**

23 While the decision to reconsider is discretionary and not reviewable, the ultimate  
24 agency decision is reviewable under RCW 34.05 570. The criteria for review of an agency  
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1 action is generally limited to the record established by the agency.<sup>5</sup> When the record is  
2 complete as here, the EFSEC should not be concerned but may well want to be mindful of what a  
3 reviewing court would be looking for if asked to review the agency decision. This forethought  
4 should guide how EFSEC decides whether the record justifies the recommendation.

5 **E. New Evidence**

6 The APA is clear on what “new evidence” the reviewing court may entertain. RCW  
7 34.05.562 provides:

8 (1) The court may receive evidence in addition to that contained in the agency  
9 record for judicial review, only if it relates to the validity of the agency action at  
10 the time it was taken and is needed to decide disputed issues regarding:  
11 (a) Improper constitution as a decision-making body or grounds for  
12 disqualification of those taking the agency action; (b) Unlawfulness of procedure  
13 or of decision-making process; or (c) Material facts in rule making, brief  
14 adjudications, or other proceedings not required to be determined on the agency  
15 record. (2) The court may remand a matter to the agency, before final disposition  
16 of a petition for review, with directions that the agency conduct fact-finding and  
17 other proceedings the court considers necessary and that the agency take such  
18 further action on the basis thereof as the court directs, if: (a) The agency was  
19 required by this chapter or any other provision of law to base its action  
20 exclusively on a record of a type reasonably suitable for judicial review, but the  
21 agency failed to prepare or preserve an adequate record; (b) The court finds that  
22 (i) new evidence has become available that relates to the validity of the agency  
23 action at the time it was taken, that one or more of the parties did not know and  
24 was under no duty to discover or could not have reasonably been discovered until  
25 after the agency action, and (ii) the interests of justice would be served by remand  
to the agency; (c) The agency improperly excluded or omitted evidence from the  
record; or (d) A relevant provision of law changed after the agency action and the  
court determines that the new provision may control the outcome.

19 RCW 34.05.562

20 When an agency is making a decision/recommendation, it must be mindful of what a  
21 reviewing court could consider. That is why the APA allows the agency options when a

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23 <sup>5</sup> EFSEC’s decision-making scheme is unique in that it inserts an additional layer of decision-making by  
24 the Governor. Presumably, the record any court would ultimately review would include any new information the  
25 Governor might add to the “record”. What, if any, new evidence is proper before the Governor will not be  
addressed here. For the purposes of this argument “agency” includes the record developed by EFSEC and the  
Governor.

1 petition for reconsideration is filed. The agency can do nothing and the order will be deemed  
2 denied; or the agency may act by: denying the petition; granting the petition and dissolving or  
3 modifying the final order or granting the petition and setting the matter on for further hearing.  
4 RCW 34.05.470(3). In the latter instance, the agency is in essence reopening the record for  
5 new evidence and must by inference consider the criteria for the taking of new evidence  
6 pursuant to RCW 34.05.562.

7 (1) The court may receive evidence in addition to that contained in the agency  
8 record for judicial review, only if it relates to the validity of the agency action at  
9 the time it was taken and is needed to decide disputed issues regarding:  
10 (a) Improper constitution as a decision-making body or grounds for  
11 disqualification of those taking the agency action; (b) Unlawfulness of  
12 procedure or of decision-making process; or (c) Material facts in rule making,  
13 brief adjudications, or other proceedings not required to be determined on the  
14 agency record. (2) The court may remand a matter to the agency, before final  
15 disposition of a petition for review, with directions that the agency conduct fact-  
16 finding and other proceedings the court considers necessary and that the agency  
17 take such further action on the basis thereof as the court directs, if: (a) The  
18 agency was required by this chapter or any other provision of law to base its  
19 action exclusively on a record of a type reasonably suitable for judicial review,  
20 but the agency failed to prepare or preserve an adequate record; (b) The court  
21 finds that (i) new evidence has become available that relates to the validity of  
22 the agency action at the time it was taken, that one or more of the parties did not  
23 know and was under no duty to discover or could not have reasonably been  
24 discovered until after the agency action, and (ii) the interests of justice would be  
25 served by remand to the agency; (c) The agency improperly excluded or omitted  
evidence from the record; or (d) A relevant provision of law changed after the  
agency action and the court determines that the new provision may control the  
outcome.

RCW 34.05.562

As the environmental hearings board cases illustrate, a key consideration is whether,  
with due diligence, this information could have been ascertained at the time of the hearing.  
CR 59(4) and RCW 34.05.562(2)(b)(i). Here, there is no suggestion that the information  
provided by the applicant was not available prior to or at the time of the hearing or that the  
“new” evidence is anything more than cumulative information.

1       What about the other criteria? The applicant invites the parties to speculate, as it  
2 provides no legal basis for its claims. In reviewing the criteria under RCW 34.05 562(1) the  
3 applicant does not suggest that any of the grounds have been met. There is no suggestion that  
4 there is an irregularity in the board composition or disqualification of its members; no alleged  
5 unlawfulness in the actions taken by the EFSEC and (c) is not applicable.

6       As a guardian of the administrative process, the EFSEC must also think about whether  
7 a court in viewing the record would suggest that more fact-finding might be necessary and  
8 remand it. If a court might invoke this procedure, the EFSEC would be wise to think about  
9 whether it should do so on its own rather than wait for the court to do so. The criterion in  
10 RCW34.05.562 (2) governs when living with the record as it exists is not proper. The choices  
11 are: (a) inadequate record; (b)(i) due diligence and (ii) interests of justice; (c) improper  
12 inclusion or exclusion of evidence and (d) change of law. None of these provisions were  
13 alleged or apply. Therefore, the EFSEC as the guardian of a properly developed record is under  
14 no obligation to simply rehash what has been debated already or give the applicant one more  
15 opportunity to add evidence. The applicant got its chance to make its record the first time.

16       The APA dictates the standard for judicial review. It sets forth nine criteria to assist the  
17 court in its decision-making. RCW 34.05.570(3) provides:

18       ...(3) Review of agency orders in adjudicative proceedings. The court shall grant  
19 relief from an agency order in an adjudicative proceeding only if it determines  
20 that: (a) The order, or the statute or rule on which the order is based, is in  
21 violation of constitutional provisions on its face or as applied; (b) The order is  
22 outside the statutory authority or jurisdiction of the agency conferred by any  
23 provision of law; (c) The agency has engaged in unlawful procedure or decision-  
24 making process, or has failed to follow a prescribed procedure; (d) The agency  
25 has erroneously interpreted or applied the law; (e) The order is not supported by  
evidence that is substantial when viewed in light of the whole record before the  
court, which includes the agency record for judicial review, supplemented by any  
additional evidence received by the court under this chapter; (f) The agency has  
not decided all issues requiring resolution by the agency; (g) A motion for  
disqualification under RCW 34.05.425 or 34.12.050 was made and was  
improperly denied or, if no motion was made, facts are shown to support the grant  
of such a motion that were not known and were not reasonably discoverable by

1 the challenging party at the appropriate time for making such a motion; (h) The  
2 order is inconsistent with a rule of the agency unless the agency explains the  
inconsistency by stating facts and reasons to demonstrate a rational basis for  
inconsistency; or (i) The order is arbitrary or capricious.

3 RCW 34.05.570(3)

4 Of these nine, there appears to be several possible grounds that SE2 might advance, but  
5 we will demonstrate in the following subsections that none of them apply.

6 **1. The Agency Has Not Erroneously Interpreted Or Applied The Law**  
7 **RCW 34.05.570(3)(d) and The Order Is Supported By Evidence Which Is**  
8 **Substantial When Viewed In Light Of The Whole Record...**  
9 **RCW 34.05.570(3)(e)**

10 With respect to issues of law under RCW 34.05.570(3)(d), the agency's legal  
11 conclusions are reviewed de novo. Substantial weight is accorded the agency's interpretation  
12 of the law where the agency has specialized expertise in dealing with such issues, but the court  
13 is not bound by the agency's interpretation of a statute. City of Redmond v. Cent. Puget Sound  
14 Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46 959 P.2d 1091 (1998). In reviewing  
15 challenged findings under RCW 34.05.570(3)(e), substantial evidence is a sufficient quantity  
16 of evidence to persuade a fair-minded person of the truth or correctness of the order.  
17 Redmond, 136 Wn.2d at 46 (internal quotation and citation omitted). The court neither weighs  
18 credibility nor substitutes its judgment for that of the agency. Nguyen v. Dep't of Soc. &  
19 Health Servs., 99 Wn. App. 96, 101, 994 P.2d 216 (citing U.S. West Communications, Inc. v.  
Wash. Utils. & Transp. Comm'n, 134 Wn.2d 48, 61-62, 949 P.2d 1321 (1997)).

20 The applicant concedes that the EFSEC has the authority and expertise to weigh the  
21 evidence and impose conditions. The applicant challenges the EFSEC interpretation of where  
22 they draw the line on what is a condition which could be imposed based on the record and what  
23 is a fundamental change in the project which is beyond their authority. As discussed above, at  
24 some point, amendments to an application must end and the proper process must be a new  
25 application.

1 Applicant suggests conditions which they are now willing to accept. Applicant opines  
2 that these conditions viewed in their entirety should be sufficient to convert a recommended  
3 denial of the application into a draft site certification. However, none of them address the  
4 fundamental issue of whether the limits of this airshed can withstand the level of pollutants a  
5 plant of this nature emits. EFSEC must address not only the basic conditions of a plant in  
6 theory but also the interplay with the unique features of the physical environment. It is after  
7 all, a siting authority. The SE2 proposal in theory may represent the newest benchmark in this  
8 technology. However, if this technology cannot address the environmental issues of its  
9 geography, it is not proper for siting in the proposed location. No condition, absent a move out  
10 of the airshed will address this fundamental problem. A move out of the airshed would require  
11 a new application to determine whether the technologies are appropriate and the environmental  
12 balance can be maintained. There is no suggestion that the EFSEC in performing this function  
13 failed to act in a fair-minded fashion or ignored relevant evidence. A reviewing court would  
14 have no grounds to render a different result based on this record. Therefore, the EFSEC should  
15 feel confident that the record supports its recommendation when the ultimate agency decision  
16 is rendered. A reviewing court would affirm the agency decision based on this record.  
17 Reconsideration is not warranted.

18 **2. The Order Is Not Arbitrary And Capricious RCW 34.05.570(3)(i)**

19 A decision is arbitrary or capricious under RCW 34.05.570(3)(i) if it is a “willful and  
20 unreasoning action, taken without regard to or consideration of the facts and circumstances  
21 surrounding the action.” Redmond, 136 Wn.2d at 46-47, (quoting Kendall v. Douglas, Grant,  
22 Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).  
23 If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly  
24 and upon due consideration, even if a court might think a different conclusion might have been  
25 reached. Buechel v. Dep’t of Ecology, 125 Wn.2d 196, 202, 884 P.2d 910 (1994).

1 The record and order make it abundantly clear that the EFSEC was very deliberative in  
2 its reasoning, labored over the record, and gave careful consideration to each feature presented  
3 by all parties. There is nothing that supports a contention that the EFSEC was arbitrary or  
4 capricious. Reasonable minds may differ on the fine points; this is not the criterion. Even if a  
5 court were to personally believe a different result could have sprung from these proceedings,  
6 absent a demonstration the agency decision was unreasonable, non-deliberative or dishonest,  
7 the decision would stand. There has been no such allegation or showing in the applicant's  
8 petition.

9 In sum, reconsideration should be used to address obvious errors in the record. The  
10 EFSEC must be mindful of what a reviewing court might do. To that end, the EFSEC must  
11 think about whether a reviewing court would have the grounds to overturn the agency action  
12 because of a defect in the record, the need for new evidence or procedural irregularities. The  
13 applicant has not established any of these bases for reconsideration.

14 **F. Counsel for the Environment Does Not Believe The Suggested Conditions Take**  
15 **Care Of Her Concerns**

16 As a general proposition, none of these new proposed conditions can be viewed in  
17 isolation. It is imperative that they be viewed in light on their impact on the whole record.  
18 CFE reiterates her objection to using a petition for reconsideration to amend the application  
19 after fact-finding because the process is simply inadequate to provide the deliberation  
20 necessary. The proper process is set forth in RCW 80.50.100- a new application.

21 **1. Energy Policy/Need And Consistency**

22 Applicant now offers to make some of the assurances designed to give the citizens the  
23 benefits of the energy in light of the environmental consequences. At the hearing, it was  
24 vehement that market must drive this decision, that it was a fiction to suggest that power sold  
25 here would stay here and that there was no place for long term contracts. (*See* applicants post

1 hearing briefing) Now it suggests that it may be possible in light of the current energy  
2 situation. At the hearing, parties offered evidence on all these subjects. Nothing has changed.  
3 Applicant's concession now is another straw man. Further, it does not indicate it will in fact  
4 do these things; only that it may be possible. If granted, will we next see an amendment asking  
5 that the condition be removed as the EFSEC saw in the Chehalis Generating Facility  
6 Amendment of 2000? The bottom line is, this offer is too little, too late and not designed to  
7 offer the assurances the statute demands that abundant and reasonably priced energy will be  
8 available for the citizens of Washington state. EFSEC struck the proper balance when it  
9 indicated that an applicant must pay its fair share of all costs by addressing externalities when  
10 there is no demonstrated guarantee that the citizens will otherwise benefit.

## 11           **2.     Air Quality**

12           Counsel for the Environment incorporates by reference the arguments of intervenor  
13 Abbotsford. While elimination of diesel will decrease some of the pollutants, the average three  
14 tons into the compromised airshed is not eliminated by the removal of the alternative fuel.

15           In addition, applicant's suggested fix by offering either offsets or cash does not solve  
16 the problem. As applicant argued at the hearing, it was unable to convince Canadian officials  
17 of the value. Applicant suggested by its various offset scenarios that it was in the best position  
18 to decide how additional pollutants would be "offset" by its enterprises. Fundamentally  
19 however, the evidence is clear that the goal is not maintenance of the status quo but a net  
20 decrease over time. The offsets at best might maintain the status quo.

21           The financial expectations of this private enterprise should not drive how a government  
22 decides how it will address its environmental agenda. Furthermore, the applicant offers no  
23 basis for how the money will in fact offset. Instead, it offers it in hopes that it can buy its way  
24 into the airshed. In addition, the applicant offers no information on how it arrived at the  
25 monetary figure or how this figure would in fact offset its share of pollutants. The argument

1 advanced by applicant in its petition is no different than what it advocated at the hearing.  
2 There is no basis for changing the EFSEC findings and conclusions on this issue.

### 3           **3.       Water Quantity And Quality**

4           The applicant does nothing more than rehash the arguments it used during the  
5 proceedings. Its new offer is substantially the same as was offered before, and it was  
6 inadequate. Applicant suggests that the EFSEC has no authority to hold it accountable for the  
7 problems caused by others (nitrates) and it should defer to the City regarding its decision to  
8 allocate the water as it did. EFSEC has an obligation and the authority to take the broad view  
9 pursuant to RCW 80.50. Where this facility has the net effect of hastening or exacerbating an  
10 existing potential problem; it has the responsibility to plan for and take responsibility for the  
11 foreseeable consequences, this includes nitrate contamination. Where the City proposes an  
12 allocation scheme that allocates the majority of water for all users with little margin of error,  
13 EFSEC has the responsibility to take a closer look. Where there is clear evidence that the  
14 potential draw-down will impact existing users, the EFSEC was well within its authority to  
15 determine that the pre-offered solution was inadequate. The EFSEC again did not need to  
16 figure out how to fix this environmental impact in light of its recommendation

### 17           **4.       Impact On Wetlands**

18           Elimination of the diesel tanks fundamentally changes the configuration of the plant.  
19 Applicant has not offered, and could not, without supplementing the record, how the removal  
20 of the tanks and its affiliated features would impact the wetlands. We do not know what the  
21 new configuration will be. EFSEC did not need to reach its concerns about the wetlands in  
22 light of its decision to recommend denial. Proper analysis would require submission of a new  
23 design, time to analyze and public participation. This analysis needs a new application and  
24 environmental review.

1           **5.      Flood Hazard**

2           Counsel for the Environment incorporates by reference the arguments of intervenor  
3           Whatcom County. This motion offers nothing new and continues to beg the question of how  
4           any of these proposed fixes addresses the fundamental issue of this proposal being  
5           inappropriate for this airshed.

6           **6.      Greenhouse Gases**

7           The applicant continues to assert that its voluntary offer is all that is warranted but  
8           suggests in its petition starting on page 19 that the EFSEC could condition the plant on full  
9           mitigation using the Oregon model. It is unclear whether the applicant is offering to stipulate  
10          or merely setting up an argument for why the EFSEC in doing so would be exceeding its  
11          authority. Furthermore, although the Oregon standard is a step in the right direction, it does  
12          not address all air pollution concerns. The Oregon standard at best addresses only 17% of the  
13          Greenhouse Gas emissions. Full mitigation is essential to address the fair share of the  
14          externalities associated with this type of enterprise.

15          Without rehashing arguments the EFSEC has heard throughout these proceedings, the  
16          question becomes if this condition were imposed/agreed to by the applicant, would it be  
17          enough? The answer is no, at this juncture, because 1) partial mitigation of GHG is  
18          inadequate; 2) GHG are not the only air pollutants of concern and 3) this condition cannot be  
19          evaluated in isolation and it cannot address the fundamental issue of this plant being proposed  
20          for the wrong place. The proper vehicle is a new application.

21          **7.      Noise**

22          The petition repeats an offer discussed during the adjudication that it will monitor the  
23          effect after the plant is operational. This is a rehash of its prior argument and nothing more.  
24          As Counsel for the Environment argued before, fixing a potential problem after it is discovered  
25          is not in the best interests of the citizens. The applicant must show by appropriate scientific

1 study and modeling that the plant when operational will meet existing noise requirements and  
2 that it should strive to achieve noise levels which are more healthful, this must include  
3 addressing both high and low frequency noise levels and tones.

4 Further, there is no suggestion by applicant that the testing will be conducted by an  
5 independent entity or that the facility will shut down until the problem is fixed. Again, this  
6 issue cannot be viewed in isolation. The EFSEC did not need to create conditions to address  
7 this issue because of its recommendation. As a result, the Counsel for the Environment can  
8 only speculate about whether the condition in isolation would address her concerns. The  
9 applicants' current offer is not adequate, nor can the Counsel for the Environment ascertain  
10 what or how compliance would be assessed. If the applicant wants to revisit this issue, it  
11 should do so in a new application.

#### 12 **8. Fire Hazard**

13 In isolation, the elimination of alternative fuel addresses the Counsel for the  
14 Environment's concerns regarding the potential fire hazards of the diesel back-up. However, as  
15 indicated above, Counsel for the Environment based her advocacy strategy and prioritization of  
16 resources on tackling the biggest issues, which if addressed, would obviate the need to address  
17 others. A proper analysis requires a new application and a meaningful opportunity to prioritize  
18 the issues, which need to be addressed as presented in a new application, not this piecemeal  
19 approach.

#### 20 **9. Diesel Supply And Pricing**

21 In isolation, elimination of the alternative fuel addresses this concern. However, this  
22 then raises the issue of the impact on gas supply and pricing. The EFSEC did not address this  
23 issue in its order and it did not need to in light of its recommendation. Counsel for the  
24 Environment did not feel it was proper to file a petition for reconsideration on this or any other  
25 issue in light of the recommendation. If the EFSEC allows reconsideration on whether a draft

1 site certification should be recommended, this issue must be addressed. Counsel for the  
2 Environment stands by her argument that to properly evaluate this issue, further study is  
3 necessary. This study and elimination of the concern should be done by the applicant in a new  
4 application and not by reopening the existing record.

#### 5 **10. Alternative Fuel**

6 The applicant has been incredibly labile on this subject. Its original application filed in  
7 January 1999 had no such requirement for diesel back-up. At the hearing, applicant indicated  
8 back-up fuel was added because the financial market required it—other plants approved by the  
9 EFSEC from the mid-90's had it and they wanted to be good neighbors. The reality appears to  
10 be an ability to maximize profits, which they are entitled to do, so long as it does not  
11 negatively impact the environment at the expense of the citizens. See Counsel for the  
12 Environment's arguments in its closing brief if you want to refresh your memory on all the  
13 reasons why Counsel for the Environment thinks the alternative fuel is a bad idea and the  
14 rationale offered is disingenuous. This being said, removal of diesel fuel is a step in the right  
15 direction. The question then becomes, how can we know if it is enough?

16 Applicant has a right to change its mind, but at some point it must make up its mind  
17 and stop shifting the sands so that the parties know what to analyze. As indicated above, the  
18 time for amendment has long past. Further, the removal of this option does not eliminate the  
19 air quality concerns; it simply takes one of many off the concern list. This removal does not  
20 solve the air quality concerns. While Counsel for the Environment advocated for the removal  
21 of the back-up diesel as one of a host of conditions that should be imposed, it was in an effort  
22 to mitigate a bad situation. EFSEC appropriately concluded that elimination of alternative fuel  
23 was inconsistent with the filed application.

1           **11. Traffic**

2           In isolation, elimination of the diesel addresses this concern. However, because the  
3 tanks made this traffic issue a priority, Counsel for the Environment did not need to analyze  
4 other traffic issues because if the concerns over the tanker volume could be addressed, it would  
5 take care of the other potential issues. If the tanker truck issue is eliminated, these other traffic  
6 concerns must be addressed anew. The proper mechanism is a new application.

7           **12. Site Restoration**

8           Applicant is again rehashing arguments raised below. It offers to create a plan as is  
9 required but still does not address how they arrived at the 10 million or how this sum ensures  
10 that it will cover the costs of restoration. Counsel for the Environment reiterates her argument  
11 that EFSEC should develop a strategy for assessing the proper financial package to protect the  
12 citizens from the costs of this or any other facility under its jurisdiction. This should be done  
13 as part of a new application and not piecemeal as suggested by applicant.

14           **13. Seismic**

15           Applicant reiterates that it will comply with applicable zoning requirements and  
16 conduct a probabilistic study. It does not indicate what a probabilistic study entails. Counsel  
17 for the Environment requests that if EFSEC decides to reopen the record that it allows a full  
18 evidentiary hearing in light of the new evidence offered by Dr Easterbrook's recent research.  
19 As previously indicated in Counsel for the Environment and Whatcom County joint motion to  
20 reopen, Dr Easterbrook's research was not available during the adjudicative phase and  
21 reopening the record to gather scientific data on this issue is proper. If a court were to address  
22 the issue of this newly discovered evidence it would no doubt conclude that exclusion of this  
23 evidence was improper under RCW 34.05 570(3) and RCW 34.05.562(2).

24           We need to know if building an industrial complex in the area is prudent in light of the  
25 new evidence, and if so, what type of conditions would be warranted under the circumstances.

1 In light of the current posture of this case (post deliberation) each one of these issues needs to  
2 be evaluated in the context of the entire project, not in isolation. A new application is the  
3 proper course, not re-opening the record.

#### 4 **14. Clean Air And Water Act**

5 Counsel for the Environment incorporates the argument of intervenor Department of  
6 Ecology. This project has generated substantial public interest. As a result of the public  
7 participation, the EFSEC has been able to educate the citizenry on the real issues and  
8 ameliorate some of the speculation and misunderstanding. EFSEC has the discretion to hold  
9 additional public hearings under this application pursuant to RCW 80.50.090(4) and should do  
10 so if it decides to reconsider its recommendation.

### 11 **III. CONCLUSION**

12 The Counsel for the Environment's role is to advocate for the citizens and their  
13 interests in protecting the environment. This must be done within the confines of EFSEC's  
14 mandates as set forth in RCW 80.50.010. Paramount is the balance between the need for  
15 "...abundant energy at a reasonable cost..." and the obligation "...to preserve and protect the  
16 quality of the environment..." RCW 80.50.010(3)&(2). EFSEC properly evaluated these  
17 priorities and concluded that the risks to the environment were too high and the applicant failed  
18 to establish that this proposal would ensure that the citizens of Washington would get access to  
19 energy at a reasonable cost as a result of this facility.

20 The petition for reconsideration must be denied because the applicant has failed to meet  
21 its burden of establishing that any of the criteria under any of the standards set forth above  
22 have been met. Further, this application has a fatal flaw, which cannot be corrected by any  
23 conditioning—the proposed facility is in the wrong air-shed.

24 If the EFSEC disagrees with this assertion, it must reopen the proceedings on each of  
25 the issues addressed in the petition. New evidence is necessary to determine the scope of these

1 new proposed conditions and how each fits with the other. A reopening of the record must  
2 include further public participation and comment for not only the Clean Air and Water ACT  
3 issues but also all the amendments to the application.

4 Counsel for the Environment urges the EFSEC to deny reconsideration of Order 754  
5 and send its original recommendation to the governor for his deliberation consistent with  
6 RCW 80.50.100.

7 Respectfully submitted this \_\_\_\_\_ day of \_\_\_\_\_ 2001.

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